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No. 05-184

IN THE

Supreme Court of the United States

SALIM AHMED HAMDAN,

Petitioner,

vs.

DONALD H. RUMSFELD,
Secretary of Defense, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the military commission established by the President to try petitioner and others similarly situated for alleged war crimes in the war on terror is duly authorized under Congress's Authorization for the Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224; the Uniform Code of Military Justice (UCMJ); or the inherent powers of the President?

2. Whether petitioner and others similarly situated can obtain judicial enforcement from an Article III court of rights protected under the 1949 Geneva Convention in an action for a writ of habeas corpus challenging the legality of their detention by the Executive branch?

3. Whether the Detainee Treatment Act divests this Court of jurisdiction to hear this case?

This brief *amicus curiae* will address Question 3.

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

In opposing the motion to dismiss under the Detainee Treatment Act, Petitioner proposes an excessively broad view

1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

of the Suspension Clause and an unduly narrow view of the circumstances in which legislative changes apply to pending cases. Adoption of these arguments would hinder the executive and legislative branches in their efforts to combat both terrorism and ordinary crime to a much greater degree than the Constitution actually requires. Such restrictions would be contrary to the interest CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

The case is summarized in the opinion of the Court of Appeals:

> "Afghani militia forces captured Salim Ahmed Hamdan in Afghanistan in late November 2001. Hamdan's captors turned him over to the American military, which transported him to the Guantanamo Bay Naval Base in Cuba. The military initially kept him in the general detention facility, known as Camp Delta. On July 3, 2003, the President determined 'that there is reason to believe that [Hamdan] was a member of al Qaeda or was otherwise involved in terrorism directed against the United States.' This finding brought Hamdan within the compass of the President's November 13, 2001, Order concerning the Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833. Accordingly, Hamdan was designated for trial before a military commission.
>
> "In December 2003, Hamdan was removed from the general population at Guantanamo and placed in solitary confinement in Camp Echo. That same month, he was appointed counsel, initially for the limited purpose of plea negotiation. In April 2004, Hamdan filed this petition for habeas corpus. While his petition was pending before the district court, the government formally charged Hamdan with conspiracy to commit attacks on civilians and civilian objects, murder and destruction of property by an

unprivileged belligerent, and terrorism. The charges alleged that Hamdan was Osama bin Laden's personal driver in Afghanistan between 1996 and November 2001, an allegation Hamdan admitted in an affidavit. The charges further alleged that Hamdan served as bin Laden's personal bodyguard, delivered weapons to al Qaeda members, drove bin Laden to al Qaeda training camps and safe havens in Afghanistan, and trained at the al Qaeda-sponsored al Farouq camp. Hamdan's trial was to be before a military commission, which the government tells us now consists of three officers of the rank of colonel. Brief for Appellants at 7.

"In response to the Supreme Court's decision in *Hamdi v. Rumsfeld*, 542 U. S. 507, 124 S. Ct. 2633, 159 L. Ed. 2d 578 (2004), Hamdan received a formal hearing before a Combatant Status Review Tribunal. The Tribunal affirmed his status as an enemy combatant, 'either a member of or affiliated with Al Qaeda,' for whom continued detention was required.

"On November 8, 2004, the district court granted in part Hamdan's petition. Among other things, the court held that Hamdan could not be tried by a military commission unless a competent tribunal determined that he was not a prisoner of war under the 1949 Geneva Convention governing the treatment of prisoners. The court therefore enjoined the Secretary of Defense from conducting any further military commission proceedings against Hamdan." *Hamdan* v. *Rumsfeld*, 415 F. 3d 33, 35-36 (CADC 2005).

Hamdan's original petition "challenge[d] the nature and length of [his] pretrial detention," *Hamdan* v. *Rumsfeld*, 344 F. Supp. 2d 152, 155 (DC 2004). However, due to events prior to the District Court's decision, that court stated, "Hamdan does not currently challenge his detention as an enemy combatant in proceedings before this Court." *Id.*, at 173, n. 18. The District Court's order did not make any change in Hamdan's custody other than requiring that "that petitioner be released

from the pre-Commission detention wing of Camp Delta and returned to the general population of Guantanamo detainees, unless some reason other than the pending charges against him requires different treatment." *Id.*, at 174.

The Court of Appeals reversed on July 15, 2005. This Court granted certiorari on November 7, 2005. *Hamdan* v. *Rumsfeld*, 126 S. Ct. 622, 163 L. Ed. 2d 504 (2005).

On December 30, 2005, as part of a defense appropriations bill, Congress enacted the Detainee Treatment Act, Pub. L. 109-148, 119 Stat. 2739, §§ 1001-1006. Sections 1002, 1003, and 1006 enact protections for detainees. Section 1005 is captioned "Procedures for status review of detainees outside the United States." Subsection (e)(1) adds a new subsection (e) to the general habeas statute, 28 U. S. C. § 2241:

> "(e) Except as provided in section 1005 of the Detainee Treatment Act of 2005, no court, justice, or judge shall have jurisdiction to hear or consider—
>
> > "(1) an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba; or
> >
> > "(2) any other action against the United States or its agents relating to any aspect of the detention by the Department of Defense of an alien at Guantanamo Bay, Cuba, who—
> >
> > > "(A) is currently in military custody; or
> > >
> > > "(B) has been determined by the United States Court of Appeals for the District of Columbia Circuit in accordance with the procedures set forth in section 1005(e) of the Detainee Treatment Act of 2005 to have been properly detained as an enemy combatant."

Subsections 1005(e)(2) and (e)(3) give the Court of Appeals for the District of Columbia Circuit exclusive jurisdiction to review the final decisions of the Combatant Status

Review Tribunals (CSRT) and military commissions, respectively. They include in the matters to be reviewed whether the procedures conflict with any applicable provision of the Constitution or laws of the United States. Subsection (f) clarifies that the Act itself does not make any such provision applicable that did not apply before.

Subsection (g) specifies that for the purpose of the section, Guantanamo Bay is not within the United States.

Subsection (h)(1) specifies that in general the "section shall take effect on the date of the enactment of this Act." Subsection (h)(2) provides specifically that (e)(2) and (e)(3) "shall apply with respect to any claim whose review is governed by one of such paragraphs and that is pending on or after the date of the enactment of this Act." Application of (e)(1) to pending cases is not specifically addressed.

The government has moved for dismissal for want of jurisdiction. That motion is pending as of the printing deadline for this brief.

SUMMARY OF ARGUMENT

The Detainee Treatment Act (DTA) applies to this case and divests the jurisdiction of both lower courts and this Court. The general rule is that a new statute applies to pending cases when Congress does not specify otherwise and when application would not have a retroactive effect.

The fact that Congress specifies application to pending cases for one part of a statute and not for another does not compel the conclusion that Congress had a coherent intent that the latter provision not apply. Taking a realistic view of legislation as the product of compromise, a lack of specification is more likely the result of the inability of either faction to get its view into the statutory language, while the two sides could agree to leave the matter to the courts to apply the default rule.

Upon finding that the DTA applies and divests jurisdiction, the only proper course is to vacate and remand with directions to dismiss. With no lower court decision to review, this Court has no jurisdiction to issue an original writ.

The constitutional "privilege of the writ of habeas corpus" does not extend to an alien captured abroad as an enemy by the military, with no connection to the United States other than military detention in territory under our control. The historical cases granting habeas relief to aliens were all for aliens who had become a "part of the population" within the meaning of *The Japanese Immigrant Case*. The historical cases denying habeas relief to military prisoners are at best ambiguous as to whether relief was denied on the merits or on standing to apply for the writ.

Finally, Hamdan cannot claim the constitutional entitlement to habeas corpus because he does not seek the only remedy that was available in habeas at common law. The fact that modern courts and legislatures have extended habeas corpus to provide relief other than release from custody does not mean that Congress is constitutionally obligated to do so.

ARGUMENT

I. The Detainee Treatment Act applies to this case and repeals the habeas jurisdiction in this case, both of the lower courts and this Court.

A. Jurisdictional Changes and Pending Cases.

As far back as 1879, this Court declared it to be "well settled that if a law conferring jurisdiction is repealed without any reservation as to pending cases, all such cases fall within the law." *Railroad Co.* v. *Grant*, 8 Otto (98 U. S.) 398, 401 (1879). A compelling case would be required to reach a different result here. Nor will an implicit reservation suffice. "When the very purpose of Congress is to take away jurisdiction, of course it does not survive, even as to pending suits,

unless *expressly* reserved." *De La Rama S. S. Co.* v. *United States*, 344 U. S. 386, 390 (1953) (emphasis added).

Petitioner notes that the DTA is not directed specifically at this Court's appellate jurisdiction and that the court whose jurisdiction is repealed has already decided the case. See Petitioner's Opposition to Respondents' Motion to Dismiss 26-27, 31-32 ("Opp. Dismiss"). However, it has long been settled that a statute divesting the lower court of jurisdiction while review of the judgment is pending also divests the appellate courts of jurisdiction, absent a provision in the statute to the contrary. *Smallwood* v. *Gallardo*, 275 U. S. 56 (1927) is on point. The plaintiffs had obtained in the Federal District Court an injunction against taxes imposed by the laws of Puerto Rico.[2] See *id.*, at 60. After the Court of Appeals for the First Circuit had affirmed, Congress passed a tax injunction act for Puerto Rico, "That no suit for the purpose of restraining the assessment for collection of any tax imposed by the laws of Porto Rico shall be maintained in the District Court of the United States for Porto Rico." *Id.*, at 61, quoting 44 Stat. 1418, 1421. Justice Holmes' opinion for the Court easily dispatched the argument that repeal of the District Court's jurisdiction did not affect the case at the appellate stage. "Of course it does not matter that these cases had gone to a higher court. When the root is cut the branches fall." *Id.*, at 62. The same result followed in a companion case that had already been transferred to this Court before the statute was enacted. See *Gallardo* v. *Santini Fertilizer Co.*, 275 U. S. 62 (1927).

Smallwood also addressed the claim that the repeal of jurisdiction had left the plaintiffs without any remedy. The statute did, indeed, deprive them of any prospective remedy, as tax injunction acts generally do. See *Hibbs* v. *Winn*, 542 U. S. 88, 104 (2004). The fact that the alternative remedies were less effective did not change the result. "It does not leave the taxpayer without power to resist an unlawful tax, whatever the

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2. Spelled "Porto Rico" in the statutes and the opinion.

difficulties in the way of resisting it." *Smallwood*, 275 U. S., at 62. As discussed *infra*, at 9-11, the DTA does not eliminate challenges to the military tribunals.

Even if the DTA did eliminate judicial challenges, though, that would not prevent its application to pending cases. Petitioner contends that the cases cited by the government are inapposite because they "simply transferred jurisdiction over a case from one tribunal to another," whereas the DTA "purports to strip jurisdiction from *any* court to consider Hamdan's claim . . . ." Opp. Dismiss 13 (emphasis in original). The transition from "tribunal" to "court" in this argument is a missing link. *Hallowell* v. *Commons*, 239 U. S. 506, 508 (1916) does indeed say that the statute "simply changes the tribunal that is to hear the case," but the alternate tribunal is not a court. In that case, Congress repealed the jurisdiction for judicial review of certain decisions of the Secretary of the Interior regarding the estates of deceased Indians. The decision of the executive, previously reviewable in court, was made final. See *ibid.* The statute in that case *did* strip jurisdiction from any court, but the standard rule of applying jurisdiction-ousting statutes to pending cases still applied.

In his surreply, Petitioner tries to distinguish *Hallowell* on two grounds—that it did not eliminate previously conferred rights and that other modes of review might have remained available. See Petitioner's Surreply Regarding Respondent's Motion to Dismiss 4 ("Surreply"). Regarding the first point, § 1005(e)(1) does not take away any rights, but is a pure repeal of jurisdiction. As discussed in the next section, the only limitation on substantive rights is in paragraphs (2) and (3), which are expressly made applicable to pending cases. On the second point, the possibility of other modes of review of the executive decision is irrelevant to the statutory interpretation question in *Hallowell*. The repeal of the particular jurisdictional statute at issue applied to pending cases even though the alternative forum was executive and not judicial.

B. Scope of Review Under the DTA.

Petitioner insists that applying the new § 2241(e) to his case will eliminate, not just postpone, any judicial consideration of "his principal claims that the President's Nov. 13, 2001 order establishing his commission lacks legislative authorization (Question 1 on which certiorari was granted) or that his commission violates the Geneva Conventions (Question 2)." Opp. Dismiss 1-2. As to Question 1, he is incorrect. As to Question 2, he is correct, but preclusion of such claims is compelled by the language of the statute and well within the power of Congress.

Question 1, in full, is "Whether the military commission established by the President to try Petitioner and others similarly situated for alleged war crimes in the 'war on terror' is duly authorized under Congress's Authorization for the Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224; the Uniform Code of Military Justice (UCMJ); or the inherent powers of the President?" Brief for Petitioner i. Unlike the issue of application to pending cases, discussed *infra*, at 13, Senator Levin succeeded in getting his view on this point affirmatively added to the statutory language.

> "Second, the initial Graham amendment would have provided for direct judicial review only of status determinations by Combat Status Review Tribunals, CSRTs. By contrast, the revised Graham-Levin-Kyl amendment adopted by the Senate provided for direct judicial review of both status determinations by CSRTs and convictions by military commissions. The amendment does not affirmatively authorize either CSRTs or military commissions—instead, it establishes a judicial procedure for determining the constitutionality of such processes.
>
> "Again, this improvement is preserved in the conference report, which retains the Senate language authorizing direct review of both status determinations by CSRTs and convictions by military commissions.

> "Third, the initial Graham amendment would have provided only for review of whether a tribunal complied with the Department's own standards and procedures. By contrast, the revised amendment adopted by the Senate would authorize courts to determine whether the standards and procedures used by CSRTs and military commissions are consistent with the Constitution and laws of the United States.
>
> "This language has been revised in conference only to state what the intent of the amendment already was—that it was not intended to grant to an alien detainee any rights under the Constitution and laws of the United States that the detainee does not already have. Otherwise, the improved language remains intact in the conference report: The courts would be expressly authorized to determine whether the standards and procedures used in a status determination or the trial of an alien detainee at the Guantanamo are consistent with the Constitution and laws of the United States, as they apply to that detainee." 151 Cong. Rec. S14258 (daily ed. Dec. 21, 2005) (statement of Sen. Levin).

For Petitioner to prevail on Question 1 in the present case, he would have to establish that the military commissions are not authorized by statute *and* not within the inherent powers of the President *and* in violation of an applicable protection. The DTA gives the Court of Appeals jurisdiction to decide whether use of the standards and procedures established under Military Commission Order No. 1 is "consistent with the [applicable] Constitution and laws of the United States." DTA § 1005(e)(3)(D)(ii). Among the procedures are the establishment of the commissions themselves. See Dept. of Defense, Military Commission Order No. 1, § 2 (Aug. 31, 2005).

Congress carefully avoided making applicable to the Guantanamo detainees any constitutional or statutory protection that did not apply before. The "extent [to which] the Constitution and laws of the United States are applicable" is clearly left

to judicial decision by § 1005(e)(3)(D)(ii). If the commissions are unauthorized and the Due Process Clause of the Fifth Amendment is applicable, or if any statute protects Hamdan from trial by an unauthorized commission, the Court of Appeals has jurisdiction to so decide. Decision of these issues is not eliminated by applying the DTA to pending cases, but only postponed to review of a final judgment.

Petitioner is correct that the DTA cuts off claims for direct enforcement of the Geneva Convention, but this result follows from the language of the statute. The general habeas jurisdiction statute extends to persons held "in custody in violation of the Constitution or laws *or treaties* of the United States . . . ." 28 U. S. C. § 2241(c)(3) (emphasis added). The DTA gives the Court of Appeals "exclusive jurisdiction to determine the validity of any final decision" of the military commission § 1005(e)(3)(A) but limits review of the commission procedures to consistency with the Constitution and laws, not treaties. Even if a treaty is directly enforceable in court as an original matter, it ceases to be when a later statute cuts off that remedy. See *Breard* v. *Greene*, 523 U. S. 371, 376 (1998) (*per curiam*). Congress has indeed cut off direct judicial enforcement of treaty rights in the DTA, but this is not a drastic action. Whether a treaty creates any directly enforceable rights in the first place is often in doubt, and that issue is presently before this Court in *Bustillo* v. *Johnson*, No. 05-51, and *Sanchez-Llamas* v. *Oregon*, No. 04-10566, regarding another treaty. Application of this change to pending cases simply means that treaty rights will be enforced through diplomatic rather than judicial channels. The only way Hamdan could litigate his treaty claim in this proceeding would be if he had greater rights of review before trial than Congress has decided he would have on review of a final judgment, and greater than any other detainee tried by a commission will have hereafter. It is unlikely that Congress intended such unequal standards of review, and the usual rules of statutory interpretation should not be bent to achieve such inequality.

C. Legislative Language and History.

Section 1005(h)(1) provides that the "section shall take effect on the date of the enactment of this Act." This phrase has the established meaning "that courts should evaluate *each provision* of the Act in light of ordinary judicial principles concerning the application of new rules to pending cases and preenactment conduct." *Landgraf* v. *USI Film Products*, 511 U. S. 244, 280 (1994) (emphasis added). Those principles call for applying the law at the time of the decision, see *id.*, at 277, except when that application "would have retroactive effect." See *id.*, at 280. A long line of precedent establishes that statutes ousting jurisdiction are not considered to have a retroactive effect for this purpose. See *id.*, at 274; *Smallwood*, 275 U. S., at 61.

If the application of § 1005(e)(1) is to be determined by anything other than the "default rule," it can only be because Congress has so directed. Congress did not make any express provision to that effect, so direction can only be inferred as a matter of legislative intent.

Any claim to find the "intent" of a collective body must be made with caution. A statute is not like a will, expressing the intent of a single person. A statute requires the concurrence of either majorities in both houses, plus the President or two-thirds of both houses. See U. S. Const., Art. I, § 7. The Framers deliberately made statutes difficult to enact in this manner, based on their experience that the legislature was the most dangerous branch. See The Federalist No. 51 (C. Rossiter ed. 1961) (J. Madison). With this many cooks attending the pot, there may not be a single intent, but only an agreement on the statutory language with differing ideas about what it means.

The *Landgraf* Court understood that the composite intent of multiple legislative actors limited the inferences that can be drawn from silence on this issue in one section or version of a bill, compared to other sections or versions. The previous version of the bill at issue in *Landgraf* had an extensive

retroactivity section, but that bill was vetoed by the President. Omission of a similar provision in the bill passed and signed the next year was not dispositive. See 511 U. S., at 255-256. Similarly, an express nonretroactivity provision applicable to one particular lawsuit, see *id.*, at 258, did not mean the section in question was retroactive to all other lawsuits by negative implication.

Landgraf recognized that the absence of an express statement one way or the other may represent the absence of agreement on retroactivity and an agreement only to let the courts decide according to the default rule. "It is entirely possible—indeed, highly probable—that, *because it was unable to resolve the retroactivity issue* with the clarity of the 1990 legislation, Congress viewed the matter as an open issue to be resolved by the courts." *Id.*, at 261 (emphasis added).

The insight that legislatures sometimes punt to the courts issues they cannot resolve was not original to *Landgraf*, of course. Justice Frankfurter recognized this long ago. "Moreover, government sometimes solves problems by shelving them temporarily. The legislative process reflects that attitude. Statutes as well as constitutional provisions at times embody purposeful ambiguity . . . ." Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527, 528 (1947). Congress may agree on the need to pass a particular piece of legislation yet be unable to reach agreement on a particular, relatively minor point. In that event, the disputing factions may agree on statutory language, or absence of language, which each side believes gives it a good chance of winning the point in court. In the case of retroactivity, "purposeful ambiguity" means saying nothing, and the doubts left by this Court's precedents on retroactivity, see *Landgraf*, 511 U. S., at 261, make ambiguity preferable to a clear statement in the opposite direction.

A defense appropriations bill in wartime is a "must pass" bill if ever there was one. Congress understandably felt considerable urgency to come up with language that could be

enacted. Senator Levin was opposed to application to pending cases, but he agreed to a lack of specification because he believed that the "default rule" would result in § 1005(e)(1) not being applied to those cases. See 151 Cong. Rec. S14258 (daily ed. Dec. 21, 2005). Senators Graham and Kyl were equally confident of the opposite result based on their understanding of the precedents. See *id.*, at S14263.[3]

Senator Levin's view of the default rule was based on his understanding of *Lindh* v. *Murphy*, 521 U. S. 320 (1997). "Under the Supreme Court's ruling in *Lindh* v. *Murphy*, 521 U. S. 320, the fact that Congress has chosen not to apply the habeas-stripping provision to pending cases means that the courts retain jurisdiction to consider these appeals." 151 Cong. Rec. S14257 (daily ed. Dec. 21, 2005). Senator Levin is mistaken. *Lindh* is not a jurisdictional case. Nothing in *Lindh* questions the long line of precedent which establishes that a statute ousting jurisdiction is not considered to have retroactive effect for the purpose of *Landgraf*'s default rule. Although the dissent suggested the statute might be jurisdictional, see *Lindh*, *supra*, at 343-344 (opinion of Rehnquist, C.J.), the majority did not accept this argument. The majority saw the statute as having substantive effect because it changed the standard for relief. See *id.*, at 327. Hence, the jurisdictional cases were inapposite, and *Lindh* does not impair their strength as precedent.

It is true, however, that *Lindh* does give a negative inference more power than similar inferences were given in *Landgraf*. Comparing the presence of an express retroactivity clause for one chapter with the absence of such a clause for another, *Lindh* says, "Nothing, indeed, but a different intent explains the

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3. For those detainees challenging the fact of detention, Senators Kyl and Graham believed that the pending habeas actions would be converted into review of CSRT determinations under § 1005(e)(2). See *ibid.* That understanding has no application to the present petition, which does not seek release from custody. See *infra*, at 24-26.

different treatment." *Id.*, at 329. This is an exceedingly odd statement, coming only three years after *Landgraf* gave a logical and valid explanation of another reason for differential treatment in very similar circumstances. *Landgraf* recognized the legislative truth than *Lindh* ignored: Congress may be able to agree on specific retroactivity language for some aspects of the legislation while being unable to agree on others, and therefore agreeing only to leave those aspects to the courts. See *Landgraf*, 511 U. S., at 261, and n. 12.

If it were necessary to resolve this case, *amicus* CJLF would argue that *Landgraf* was right, *Lindh* was wrong, and *Lindh* should be overruled. However, it will probably never be necessary to squarely confront *Lindh*, since pre-AEDPA cases[4] are now a small and vanishing breed. It is sufficient to limit *Lindh* to its idiosyncratic facts, which include not only the differential treatment just noted, but also interlocking provisions of the two chapters which the majority believed indicated a lack of retroactivity for Chapter 153. See *Lindh*, 521 U. S., at 332-336.

If negative inferences are given as much power as a broad reading of *Lindh* would imply, the task of drafting legislation becomes needlessly complicated. Members of Congress who can agree that provision X should or should not apply to pending cases cannot simply place language to that effect in the bill. They must also consider whether a negative implication will change the application of provision Y, a provision they had previously been content to leave to the default rule.

The default rule of *Landgraf* generally reaches the right result. It applies the policy newly decided by Congress as far back as it is fair to apply it, and no farther. Congress should be able to depend on the courts to apply that rule whenever Congress has not *expressly* stated otherwise, without searching

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4. That is, cases in which a federal habeas corpus petition was filed prior to the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 and has not yet been finally resolved.

for strained and weak inferences in easily manipulated legislative history.

Congress agreed to make no express statement either way on the application of § 1005(e)(1) to pending cases. That is an agreement that the courts will apply the default rule. The default rule is that jurisdictional changes apply to pending cases.

II. Absent a lower court decision to review, this Court has no jurisdiction to issue an original writ to an executive officer.

Petitioner contends that the All Writs Act, 28 U. S. C. § 1651, gives this Court jurisdiction to decide his claims on the merits even if the DTA divested the lower courts of jurisdiction. Opp. Dismiss 31. This is not correct. To see why, it is first necessary to discuss the proper disposition of the habeas case.

The Government originally moved for this Court to either dismiss the writ of certiorari for lack of jurisdiction or as improvidently granted. See Motion to Dismiss 23. That would be correct if Congress had repealed only this Court's appellate jurisdiction while leaving the lower courts' jurisdiction intact. See, *e.g.*, *Ex parte McCardle*, 74 U. S. 506, 515 (1869). However, for a statute like the present one, where the branches fall because Congress has cut the root, the correct disposition is to vacate the lower court's decision and remand with directions to dismiss for lack of jurisdiction. See *Smallwood* v. *Gallardo*, 275 U. S. 56, 62 (1927).

With the lower court decision vacated, the basis for original writ jurisdiction in this Court also falls. Section 1651 is limited to writs "in aid of [federal courts'] respective jurisdictions . . . ." It does not expand this Court's original jurisdiction, and the original version of the statute was unconstitutional to the extent it purported to do so. See *Marbury* v. *Madison*,

1 Cranch (5 U. S.) 137, 175-176 (1803). A writ which is original in form can be used when its practical effect is to review and revise the decision of another court. *Ex parte Bollman*, 4 Cranch (8 U. S.) 75, 100-101 (1807), found original habeas jurisdiction to review the pretrial detention of a defendant committed by order of the circuit court, even though the order was directed to an executive officer. *Ex parte Yerger*, 8 Wall. (75 U. S.) 85, 98 (1869), similarly found habeas jurisdiction when a challenge to executive detention had been reviewed on the merits and upheld by another court, despite Congress's repeal of this Court's jurisdiction to directly review that decision.

Yerger does not control the present case, however, because Congress has, to use Justice Holmes' metaphor, cut down the entire habeas tree at the root rather than lop off the top branches. With the lower court decisions vacated, there is nothing left but bare executive detention. This Court has no jurisdiction to issue an original writ in the absence of a lower court decision. See *Ex parte Barry*, 2 How. (43 U. S.) 65 (1844).

To the extent that Petitioner asks for an original writ of habeas corpus, mandamus, or other extraordinary writ directed to executive officers, see Petition for an Extraordinary Writ, or, in the Alternative, for an Original Writ of Habeas Corpus 11-14, that petition should be dismissed for lack of jurisdiction. Petitioner also asks for a writ directed to judges of the Court of Appeals. See *id.*, at 11, n. 5. For the reasons stated in Part I, *supra*, he is asking that they be ordered to issue a judgment they no longer have jurisdiction to issue. To this extent, the writ petition should be denied on the merits.

III. The constitutional "privilege of the writ of habeas corpus" does not extend to a person captured abroad by the military as an enemy, with no other connection to the United States.

Article I, § 9, cl. 2, of the Constitution provides, "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." Petitioner argues, "The DTA cannot deprive Hamdan of his constitutional right to habeas corpus." Opp. Dismiss 32. That claim raises the question of whether he has such a right. Is he a holder of the "privilege" referred to in the Suspension Clause?

Hamdan was captured by allied forces and turned over to the American military during the course of active hostilities in Afghanistan. See *Hamdan* v. *Rumsfeld*, 415 F. 3d 33, 35 (CADC 2005). A Combatant Status Review Tribunal has subsequently "affirmed his status as an enemy combatant, 'either a member of or affiliated with Al Qaeda,' for whom continued detention was required." See *id.*, at 36. Congress has provided for judicial review of that determination. See *supra*, at 4.

Johnson v. *Eisentrager*, 339 U. S. 763, 777 (1950), rejected a claim of a constitutional right to habeas corpus by an enemy alien. *Rasul* v. *Bush*, 542 U. S. 466, 476 (2004), distinguished *Eisentrager* on the ground that this holding related to constitutional entitlement, not the statutory writ. Because *Eisentrager*'s view of the territorial scope of the statutory writ has since been superseded, see *id.*, at 479, *Rasul* held that the District Court had jurisdiction under the statute without resolving the constitutional question. While the statute makes no distinction between citizens and aliens, the constitutional privilege undoubtedly does. If it did not, *Eisentrager* would be precedent for the proposition that a citizen could obtain no judicial review in the same circumstances.

Eisentrager's emphasis on the fact that the aliens were outside the United States must be read in light of the cases it was distinguishing. See 339 U. S., at 771. In *Yick Wo* v. *Hopkins*, 118 U. S. 356, 358 (1886), Yick Wo was a legal permanent resident of the United States and had been for 22 years, although he was not a citizen. In *The Japanese Immigrant Case*, 189 U. S. 86, 101 (1903) (emphasis added), the petitioner was "an alien, who has entered the country, and has become subject in all respects to its jurisdiction, *and a part of its population*, although alleged to be illegally here . . . ."

From the fact that the United States has generously extended constitutional protection to aliens living within the country, to visitors, and even to those who enter illegally, it does not follow that we must extend the full panoply of constitutional rights to every alien who happens to be on territory in the control of our government. The immigration cases provide a helpful illustration here. *Shaughnessy* v. *United States ex rel. Mezei*, 345 U. S. 206, 212 (1953), held that a would-be immigrant "on the threshold of initial entry stands on a different footing" than Ms. Yamataya in *The Japanese Immigrant Case*. Though the latter had been in the United States less than two weeks, 189 U. S., at 87, she was entitled to basic due process. See *id.*, at 101. For the alien at the threshold, the only process due was whatever Congress had provided. See *Shaughnessy*, *supra*, at 212. This was so even though he was within the territorial boundaries of the United States (Ellis Island) and deprived of his liberty by agents of the federal government. See *id.*, at 213.[5]

INS v. *St. Cyr*, 533 U. S. 289, 301 (2001), indicates that "at the absolute minimum, the Suspension Clause protects the writ

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5. The Government did not contest that he could challenge his detention by habeas corpus. See *ibid.* Like Rasul, he was within the terms of the habeas statute, and the Suspension Clause was not at issue.

'as it existed in 1789,' "[6] and that we can look to English decisions prior to that date, as well as early American decisions, for the meaning of the constitutional protection. A number of early cases have been cited for the proposition that the common law writ extended to aliens, see Opp. Dismiss 34, n. 35; *Rasul*, 542 U. S., 481, n. 11, but on closer examination each of these cases either extends habeas relief to a person who is "part of the population," denies relief without distinguishing the merits from the jurisdiction, or supports the argument that aliens captured as enemies by the military and otherwise unconnected with the country are not eligible for habeas relief.

Sommersett v. *Stewart*, 98 Eng. Rep. 499 (K. B. 1772) is a case of the first kind. Sommersett was a slave purchased in Africa and taken to Virginia, where slavery was legal. His owner, Stewart, brought him to England, where his advocates argued it was not. See *id.*, at 499. Although not originally from Britain or any of its possessions, he had been brought into the British Empire legally and permanently. The court heard his case on the merits without objection and granted relief. See *id.*, at 510.

The *Case of the Hottentot Venus*, 104 Eng. Rep. 344 (K. B. 1810) is similar.[7] Saartje Baartman, a native of South Africa and member of the Hottentot nation, was said to be "remarkable for the formation of her person" and was being exhibited to curious Londoners "under the name of the Hottentot Venus."

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6. The need for the hedge phrase "at the absolute minimum" is unclear. The entire legitimate basis of judicial review of statutes is to protect the people's sovereign right to make the principles they put into the Constitution permanent until they choose to change them by amendment. See *Marbury* v. *Madison*, 1 Cranch (5 U. S.) 137, 176 (1803). An alteration of the scope of a constitutional provision by the judiciary would be every bit as much a violation of the people's "original and supreme will," *ibid.*, as would an alteration by the legislature.

7. This case postdates the Suspension Clause, but it is close enough to have some relevance to the understanding of habeas corpus in 1789.

Id., at 344. Third parties, doubtless appalled by this spectacle, alleged "that she had been clandestinely inveigled from the Cape of Good Hope, without the knowledge of the British Governor, (who extends his peculiar protection in nature of a guardian over the Hottentot nation *under his government* . . .) . . . ." *Ibid.* (emphasis added). Although Ms. Baartman may not have been considered a British subject, neither was she a stranger to the British Empire. The court evidently regarded her as a resident of a British protectorate and a person within the protection of the Crown. On motion of the Attorney General, the court appointed investigators to determine if she was a willing participant and dismissed the proceedings upon determining that she was. See *id.*, at 344-345.

Petitioner cites *Lockington* v. *Smith* 15 F. Cas. 758 (No. 8,448) (CCD Pa. 1817), as an example of early American courts hearing "enemy aliens' habeas petitions," Opp. Dismiss 34, n. 35, but this is neither a habeas case nor a case of an enemy captured in hostilities. Lockington was a British merchant living and doing business in the United States when the War of 1812 was declared. See *id.*, at 758-759. In obedience to a presidential order, he reported himself and was confined until he agreed to parole terms, after unsuccessfully seeking habeas relief. The case cited is a suit for damages, decided well after the end of the war. See *id.*, at 759. In any event, Lockington was not a battlefield captive, but a "part of the population" as that term was later used in *The Japanese Immigrant Case*.

Rasul, 542 U. S., at 481, n. 11, cites three early American cases as examples of habeas petitions by aliens:

> "*United States* v. *Villato*, 2 Dall. 370 (CC Pa. 1797) (granting habeas relief to Spanish-born prisoner charged with treason on the ground that he had never become a citizen of the United States); *Ex parte D'Olivera*, 7 F. Cas. 853 (No. 3,967) (CC Mass. 1813) (Story, J., on circuit) (ordering the release of Portuguese sailors arrested for deserting their ship); *Wilson* v. *Izard*, 30 F. Cas. 131 (No.

17,810) (CC NY 1815) (Livingston, J., on circuit) (reviewing the habeas petition of enlistees who claimed that they were entitled to discharge because of their status as enemy aliens)."

While these cases do support the limited proposition for which *Rasul* cites them, none involves a captured enemy held by the military. *Villato* and *D'Olivera* are both routine uses of habeas corpus for pretrial review in cases of defendants held for trial in civilian courts. In both *Villato* and *Wilson*, and arguably in all three, the petitioners were part of the population of the United States within the broad meaning of *The Japanese Immigrant Case*.

The Case of the Three Spanish Sailors, 96 Eng. Rep. 775 (C. P. 1779) is a case of the second type. The three sailors were undisputedly captured as enemy aliens and prisoners of war in the first instance, but they claimed they had ceased to be such by their voluntary service on an English merchant vessel. See *id.*, at 775. The holding was that on their own showing they were enemy aliens and prisoners of war and as such the courts "can give them no redress." *Id.*, at 776. The court went on to say that if their allegations were true "it is probable they may find some relief from the Board of Admiralty." *Ibid.*

Even in the modern era, the line between jurisdiction and merits is sometimes obscure. See *Steel Co.* v. *Citizens for Better Environment*, 523 U. S. 83, 112-113 (1998) (Stevens, J., concurring in the judgment). It may be clear that a party is not entitled to relief without being clear whether the reason is jurisdictional or substantive. To conclude on the basis of this sketchy report that the court actually grappled with and decided a subtle distinction is quite a stretch. The court simply decided on the pleadings that the petitioners could get no relief from the judiciary and had to ask the executive.

King v. *Schiever*, 97 Eng. Rep. 551 (K. B. 1759) is arguably a case of the second type in one report, but it appears to be a case of the third type in another. Schiever was a Swedish

subject who claimed he had been forced into service on a French privateer before that ship was captured by the English and he was made a prisoner of war. The report of this case simply states that, "the Court thought this man, upon his own showing, clearly a prisoner of war, and lawfully detained as such. Therefore they ¶ Denied the motion." *Id.*, at 552 (footnote omitted). This summary description is consistent with the *Three Spanish Sailors'* case. Another report of the same case, *Schiever's Case*, 96 Eng. Rep. 1249 (K. B. 1759) gives a more extended report of the holding.

> "He is the King's prisoner of war, and we have nothing to do in that case, nor can we grant an habeas corpus to remove prisoners of war. His being a native of the nation not a war does not alter the case, for by that rule many French prisoners might be set liberty, as they have regiments of many other kingdoms in their service, as Germans, Italians, &c.
>
> "But, if the case be as this man represents it, he will be discharged upon application to a Secretary of State." *Id.*, at 1249.

In other words, the court did not adjudicate whether his detention as a prisoner of war was proper and expressed an opinion that it was not if his allegations were true, yet the court washed its hands of the case anyway. This case illustrates that while some aliens could seek habeas corpus in English courts, an alien captured during hostilities and held as a prisoner of war could not. Even where he alleged he was being wrongfully held and should not have been a prisoner of war, his remedy was with the executive branch and not with the judiciary.

An English commentator cites *Three Spanish Sailors* and *Schiever* as examples of the common assertion that "a prisoner of war has no standing to apply for a writ of habeas corpus." R. Sharpe, The Law of Habeas Corpus 112 (1976). Sharpe goes on to criticize this assertion and maintain that it is a question of substance and not standing, but he cites only

modern authority for that proposition. See *id.*, at 113. Whether Sharpe is correct about modern English law is irrelevant to the present case. The question is whether the adjudication of rights of aliens captured in hostilities and held as prisoners by the military was within the "Privilege of the Writ of Habeas Corpus" as it was understood in 1789. In the cases from that era, every such applicant was turned away without judicial relief, even when they may have been wrongfully held.

Petitioner Hamdan does not have or claim any connection with the United States or entitlement to the protection of its Constitution other than the fact that he is held by the military at a military installation on land leased indefinitely from Cuba, charged with aiding an organization intent on destroying us and our way of life. He has even less of a claim to being a "part of the population," and therefore entitled to the protection of our Constitution, than does a person seeking to immigrate and held at the threshold within the state of New York. See *supra*, at 19. No cases have been cited from the formative era where a purported enemy in military custody was granted habeas relief in similar circumstances, and the cases where it was considered are at least ambiguous as to whether denial was on the merits or on lack of entitlement to consideration. In the conduct of foreign and military affairs, the elected branches of government should be given the benefit of any constitutional doubt. A person in Hamdan's situation is not a holder of the constitutional privilege of the writ of habeas corpus; Congress can repeal the jurisdiction it previously granted by statute.

IV. Hamdan's petition for injunctive relief, not release, is not within the proper scope of habeas corpus at all.

" 'Petitioner does not challenge either the fact of his detention or the conditions of his confinement' before the Supreme Court." Opp. Dismiss 28 (quoting Amicus Brief of Arthur Miller). Given that validity of custody is not at issue,

any claim to a constitutional entitlement to habeas corpus vanishes.

Classical habeas corpus was about the legality of present custody and nothing else. For example, *In re Swan*, 150 U. S. 637, 653 (1893), refused to consider the validity of an order imprisoning the petition until he paid court costs, because he was still validly in custody under other parts of the order. The possibility that his custody would become illegal in the future could not be adjudicated on habeas. Even if a judgment of conviction was void for lack of jurisdiction, "its operation may be stayed by *habeas corpus* only through the exercise of the authority of the court to *remove the prisoner from custody*. That authority cannot be exercised where the custody is lawful." *McNally* v. *Hill*, 293 U. S. 131, 139 (1934) (second emphasis added).

In cases where habeas corpus is used to collaterally attack convictions, the writ has been stretched beyond recognition in this among other ways, and *McNally* is no longer good law. See *Peyton* v. *Rowe*, 391 U. S. 54, 67 (1968). The present case, however, is not about current habeas practice but about the bedrock constitutional entitlement. Congress has repealed habeas review for the Guantanamo detainees, and the question is that repeal violates the Suspension Clause as applied to this case.

There is no violation here. The furious debates about whether modern expansions of habeas corpus were authorized by Congress or invented by the courts become irrelevant once Congress acts on the subject. See Scheidegger, Habeas Corpus, Relitigation, and the Legislative Power, 98 Colum. L. Rev. 888, 932-933 (1998). The privilege of the writ of habeas corpus in 1789 meant the privilege of having a judge review the legality of custody and nothing more. That is the limitation that the people placed upon their government in the Suspension Clause, and that is the limitation that courts have the power and the duty to enforce. See *supra*, at 19, n. 5.

The only reference to custody in the District Court's order is a direction to transfer Hamdan from one wing of Camp Delta to another. See *Hamdan* v. *Rumsfeld*, 344 F. Supp. 2d 152, 174 (DC 2004). Even the modern, bloated writ of habeas corpus does not reach decisions on where to place prisoners within a prison. Such placements are litigated, when they are considered judicially at all, as civil rights suits. See *Muhammad* v. *Close*, 540 U. S. 749, 754-755 (2004) (*per curiam*); see generally *Sandin* v. *Conner*, 515 U. S. 472 (1995).

The District Court in the present case ordered that Hamdan not be tried by military commission, at least under present procedures. See *Hamdan*, 344 F. Supp. 2d, 173-174. The authority for such an order in habeas corpus was debatable even at the time. Congress has granted federal habeas courts authority to grant stays, but it limited that authority to state court proceedings. See 28 U. S. C. § 2251. Construing general powers such as the All Writs Act to include a power to stay other court proceedings would effectively strike the word "state" from § 2251. Now that Congress has acted, the previous statutory question is moot.

Hamdan is not asking to be removed from custody, and he is not within the historical scope of habeas corpus. There can be no credible claim that Congress violated the Suspension Clause by removing habeas corpus from someone who is not seeking release. The Suspension Clause therefore provides no basis for a claim that 28 U. S. C. § 2241(e) is unconstitutional as applied to this case.

CONCLUSION

The decision of the Court of Appeals should be vacated and the case remanded with directions to dismiss for want of jurisdiction.

The application for an original writ should be dismissed for want of jurisdiction to the extent it asks for a writ directed to executive officers.

The application for an original writ should be denied on the merits to the extent it asks for a writ directed to the Court of Appeals or its judges.

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Respectfully submitted,

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